LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 22 1952
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 31

UNITED STATES OF AMERICA ex rel.
JAMES SMITH,
Petitioner

v.

DR. FREDERICK S. BALDI, Superintendent
Philadelphia County Prison

On Certiorari to the United States Court of Appeals for the Third Circuit.

SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL OF PENNSYLVANIA FOR THE RESPONDENTS

FRANK P. LAWLEY, JR.,
Assistant Deputy Attorney General,
RANDOLPH C. RYDER,
Deputy Attorney General,
ROBERT E. WOODSIDE,
Attorney General.

State Capitol,
Harrisburg, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

INDEX TO BRIEF

	Page
Additional Questions Presented	1
Statement	2
Argument:	
The Judgments of the Supreme Court of Pennsylvania Were Entitled to the Same Force and Effect in the Federal Courts Which They Receive in the State Courts	3
The District Court Did Not Have Jurisdiction	6
Conclusion	23

TABLE OF CITATIONS

Cases:	Page
Almeida v. Baldi, 104 F. Supp. 321, aff'd 195 F. 2d 815	15, 16
American Surety Co. v. Baldwin, 287 U. S. 156	3
Angel v. Bullington, 330 U. S. 183	3, 4, 5
Attorney General for Ontario v. Russel, 49 Ontario L. Rep. 103	22
Belknap v. Schild, 161 U. S. 10	9

Bell Telephone Co. v. Lewis, et al., 313 Pa. 374 169 Atl. 571 20
Bollman, Ex Parte, 8 U. S. (4 Cr.) 75 ..... 8, 19
Bridges, Ex Parte, Fed. Cas. No. 1862 ..... 16, 17
Brink v. Claudy, 96 F. Supp. 220 16
Bryant v. Zimmerman, 278 U. S. 63 6
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393 ..... 5, 19
Chaffin v. Taylor, 114 U. S. 309 10
Chandler v. Dix, 194 U. S. 590 ..... 9, 10
Christian v. Atlantic & N. C. Railroad, 133 U. S. 233 9
Civil Rights Cases, 109 U. S. 3 14
Collins v. Commonwealth, 262 Pa. 572, 106 Atl. 229 20
Collins v. Hardyman, 341 U. S. 659 14
Collins v. Miller, 252 U. S. 364 7
Commonwealth ex rel. Banks v. Claudy, 370 Pa. 190, 88 A. 2d 53 4
Commonwealth ex rel. Darcey v. Claudy, 367 Pa. 130, 79 A. 2d 585, c. d. 342 U. S. 837 12
Commonwealth ex rel. Daverse v. Hohn, —— Pa. ——, —— A. 2d ——, c. d. 342 U. S. 812 12
Commonwealth ex rel. Dugan v. Ashe, 347 Pa. 588, 33 A. 2d 32 4
Commonwealth ex rel. Foster v. Ashe, 146 Pa. Superior Ct., 482, 23 A. 2d 245 4
Commonwealth ex rel. Greevy v. Reifsteck, 271 Pa. 441, 115 Atl. 130 ..... 11, 12
Commonwealth ex rel. Jackowski v. Fluck, 147 Pa. Superior Ct. 434, 24 A. 2d 729 4

Commonwealth ex rel. Lewis v. Ashe, 142 Pa. Superior Ct. 357, 16 A. 2d 433 4
Commonwealth ex rel. Lieberman v. Burke, 158 Pa. Superior Ct. 207, 44 A. 2d 597 4
Commonwealth ex rel. Maurice v. Smith, 150 Pa. Superior Ct. 455, 28 A. 2d 811 4
Commonwealth ex rel. Minerd v. Margiotti, 325 Pa. 17, 188 Atl. 524 21
Commonwealth v. Neuman, 151 Pa. Superior Ct. 642, 30 A. 2d 698 7
Commonwealth ex rel. Orlando v. Smith, 346 Pa. 42, 30 A. 2d 534 4
Commonwealth ex rel. Penland v. Ashe, 341 Pa. 337, 19 A. 2d 464 ..... 4, 12
Commonwealth v. Ragone, 317 Pa. 113, 176 Atl. 454 12
Commonwealth ex rel. Sheeler v. Burke, 367 Pa. 152, 79 A. 2d 654 12
Commonwealth ex rel. Simpson v. Burke, 171 Pa. Superior Ct. 527, 529, 89 A. 2d 898 4
Commonwealth v. Shimpeno, 160 Pa. Superior Ct. 104, 50 A. 2d 39 7
Commonwealth ex rel. Smith v. Ashe et al., 364 Pa. 93, 71 A. 2d 107, c. d. 340 U. S. 812 12
Commonwealth ex rel. Sullivan v. Ashe, 325 Pa. 305, 188 Atl. 841 12
Commonwealth ex rel. Thompson v. Dye, —— Pa. ——, —— A. 2d ——, c. d. 342 U. S. 812 12
Darcy v. Handy, 97 F. Supp. 930 16
Darr v. Burford, 339 U. S. 200 ..... 6, 8
Daverse v. Hohn, 101 F. Supp. 17 ..... 16, 17

Dorr, Ex Parte, 44 U. S. (3 How.) 103 19
Duhne v. New Jersey, 251 U. S. 311 ..... 6, 13
Dyson v. The Attorney General, (Ct. of Appeals), 27 T.L.R. 143 22
Erskine v. Hohnbach, 8 U. S. (14 Wall.) 613 10
Fitts v. McGhee, 172 U. S. 516 9
Ford Co. v. Dept. of Treasury, 323 U. S. 459 ..... 6, 20, 21
Foster v. Illinois, 332 U. S. 134, 139 11
Frank v. Mangum, 237 U. S. 309 ..... 4, 17
General Oil Co. v. Crain, 209 U. S. 211 10
Goldberg v. Daniels, 231 U. S. 18 9
Goto v. Lane, 265 U. S. 393 6
Governor of Georgia v. Madrazo, 26 U. S. (1 Pet.) 110 9
Great Northern Ins. Co. v. Read, 322 U. S. 47 6
Haffin v. Mason, 82 U. S. (15 Wall.) 671 10
Hagwood v. Southern, 117 U. S. 52 9
Hans v. Louisiana, 134 U. S. 1 ..... 6, 9, 18
Harger v. Thomas, 44 Pa. 128 7
Hanley v. Schwalby, 147 U. S. 508, 518 10
Harkrader v. Wadley, 172 U. S. 148 9
Hedgebeth v. North Carolina, 33 A. U. S. 806 11
Herndon v. Chicago R. I. & Pac. R. Co., 218 U. S. 135 10
Highway Comm. v. Utah Co., 278 U. S. 194 9
Hodge et al. v. The Attorney General, 3 Y. & C. Ex. 734 22
Holmes v. Jennison, 39 U. S. (14 Pet.) 540 6

Hudgings, Ex Parte, 249 U. S. 378 8
Hung Hang, Ex Parte, 108 U. S. 552 8
In re Ayers, 123 U. S. 443 ..... 9, 10
In re Lincoln, 202 U. S. 178 8
Jennings v. Illinois, 342 U. S. 104 11
Kaufman Const. Co. v. Holcomb et al., 357 Pa. 514, 55 A. 2d 534 20
Kentucky v. Powers, 201 U. S. 1 6
Knewel v. Egan, 268 U. S. 442 7
Larson v. Domestic & Foreign Corp., 337 U. S. 682 ..... 9, 10
Laughlin v. Rosenman, 163 F. 2d 838 10
Louisiana v. Garfield, 211 U. S. 70 9
Louisiana v. Jumel, 107 U. S. 711 9
M. C. & L. M. Railway Co. v. Swan, 111 U. S. 379 6
Marbury v. Madison, 5 U. S. (1 Cr.) 137 8
Matter of Gregory, 219 U. S. 210 8
McCardle, Ex Parte, 73 U. S. (6 Wall.) 318 ..... 6, 8
Merchants' Warehouse Co. v. Gelder, 349 Pa.1, 36 A. 2d 444 20
Merryman, Ex Parte, Fed. Cas. No. 9487 19
Mirzan, Ex Parte, 119 U. S. 585 8
Milligan, Ex Parte, 71 U. S. (4 Wall.) 2, 112 6
Minnesota v. Hitchcock, 185 U. S. 373 9
Missouri v. Fiske, 290 U. S. 18 9
Mooney v. Holohan, 294 U. S. 103 ..... 8, 11
Moore v. Dempsey, 261 U. S. 86 ..... 11, 16, 17
Morrison v. Work, 266 U. S. 481 9
Murray v. Wilson Distilling Co., 213 U. S. 251 9

North Carolina v. Temple, 134 U. S. 22 ..... 6, 9
Oregon v. Hitchcock, 202 U. S. 60 9
Ornelas v. Ruiz, 161 U. S. 502 7
Palmer v. Ashe, 342 U. S. 134 13
Palmer v. Ohio, 248 U. S. 32 ..... 6, 13
Poindexter v. Greenhow, 114 U. S. 270 10
Quirin, Ex Parte, 317 U. S. 1 6
Rooker v. Fidelity Trust Co., 263 U. S. 413 5
Royall, Ex Parte, 117 U. S. 241 ..... 17, 18
Sanders v. Fertilizer Works, 292 U. S. 190 3
State of New York, Ex Parte, (No. 1), 256 U. S. 490 9
Storti v. Massachusetts, 183 U. S. 138 8
Taylor v. McGrath, 194 F. 2d 883 10
Tennessee Power Co. v. T.V.A., 306 U. S. 118 10
Terry, Ex Parte, 128 U. S. 289 8
Thompson v. Dye, 103 F. Supp. 776 ..... 16, 17
Thompson v. Lyle, 3 W & S (6) 166 10
Tracy, Ex Parte, 249 U. S. 551 8
United States v. Cruikshank, 92 U. S. 542 14
United States v. Hayman, 342 U. S. 205 17
United States v. Lee, 106 U. S. 196 ..... 10, 22
United States v. Reese, 92 U. S. 214 14
Watkins, Ex Parte, 27 U. S. (2 Pet.) 202 19
Wells v. Roper, 246 U. S. 335 9
Whitten v. Tomlinson, 160 U. S. 231 8
Wildenhus's Case, 120 U. S. 1, 11 8
Williams v. United States, 289 U. S. 553 ..... 13, 19
Yerger, Ex Parte, 75 U. S. (8 Wall.) 85 8

CONSTITUTIONS AND STATUTES:

Constitution of the United States:

Article III, Section 2, Cl. 2 ..... 8, 13

Article IV, Section 1, ... 1, 2

Article XIV, Section 5 13

Constitution of Pennsylvania:

Article I, Section 9 19

Article I, Section 11 ..... 20, 21, 22

Article I, Section 14 11

Article V, Section 23 7

The Judicial Code., 28 U.S.C., Section 1738 ..... 1, 2

Section 2252 7

ACTS:

Act of February 18, 1785, 2 Sm. L. 275, 12 Purdons Penna. Statutes Annotated Sec. 1871 11

The Administrative Code, Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 66 (a), 244, 293; Secs. 206(a), 704, 903 ..... 20, 21

AUTHORITIES:

Blackstone's Commentaries, Vol. 1 7

Blackstone's Commentaries, Vol. 4 7

Daniell's Chancery Pleading & Practice, Vol. I, 6th Ed. 22

Warren, New Light on the History of Federal Judiciary Act of 1789, 37 Harvard Law Review 49, 91-92 13

ADDITIONAL QUESTIONS PRESENTED

1. Whether the Full Faith and Credit Clause (Article IV, Section 1) of the Federal Constitution and the legislation pursuant thereto (Section 1738, the Revised Judicial Code) does not require Federal courts, on an application for a writ of habeas corpus by a person in custody pursuant to a State criminal judgment, to accord the unreversed judgments of the State courts in direct and collateral proceedings the same force and effect which they have by law and usage in the State court?

2. Whether a habeas corpus proceeding in the Federal courts in which the constitutional validity of a State criminal judgment is assailed is not a suit against the State which, in the absence of consent by the State, is not within the judicial power of the United States?

STATEMENT

This supplemental brief is submitted, at the request of the Court, in support of the argument made by counsel for the respondents at oral argument on October 14, 1952.

ARGUMENT

The Judgments of the Supreme Court of Pennsylvania Were Entitled to the Same Force and Effect in the Federal Courts Which They Receive in the State Courts

The District Court was absolutely right in according the judgments of the Supreme Court of Pennsylvania in the appeal and collateral habeas corpus proceedings the force and effect which it did. It has long since been settled that the Full Faith and Credit clause of the Federal Constitution (Article IV, Section 1) and legislation enacted by Congress pursuant thereto (Section 1738, the Revised Judicial Code) **requires** the Federal courts to accord judicial proceedings of a State court drawn into question in an independent proceeding in the Federal courts, the same force and effect which they have by law or usage in the State courts.[1] The doctrine

[1] American Surety Co. v. Baldwin, 287 U.S. 156, 166-167; Sanders v. Fertilizer Works, 292 U.S. 190, 206 (Mr. Justice Cardozo, dissenting); Cf., Angel v. Bullington, 330 U.S. 183, 187.

is applicable to a habeas corpus proceeding in the Federal courts based on an asserted constitutional invalidity of a State criminal judgment.[2] The Federal issues presented to the District Court were clearly adjudicated by the Supreme Court of Pennsylvania in the collateral habeas corpus proceeding,[3] and could not be relitigated in the Pennsylvania courts.[4] The District Court, regardless of its views concerning the propriety or impropriety of the decision, was under a **duty** to give the unreversed judgment of the Supreme Court of Pennsylvania the same

---

[2] Frank v. Mangum, 237 U.S. 309, 333-334.

[3] The petition filed in the District Court was "a carbon copy" of the petition for a writ of habeas corpus filed in the Supreme Court of Pennsylvania. Cf., Angel v. Bullington, 330 U.S. 183, 186.

[4] Commonwealth ex rel. Banks v. Claudy, 370 Pa. 190, 88 A. 2d 53; Commonwealth ex rel. Penland v. Ashe, 341 Pa. 337, 340, 19 A. 2d 464; Commonwealth ex rel. Dugan v. Ashe, 347 Pa. 588, 589, 33 A. 2d 32; Commonwealth ex rel. Orlando v. Smith, 346 Pa. 42, 30 A. 2d 534; Commonwealth ex rel. Lewis v. Ashe, 142 Pa. Superior Ct. 357, 358, 16 A. 2d 433; Commonwealth ex rel. Foster v. Ashe, 146 Pa. Superior Ct. 482, 488, 23 A. 2d 245; Commonwealth ex rel. Jackowski v. Fluck, 147 Pa. Superior Ct. 434, 438-439, 24 A. 2d 729; Commonwealth ex rel. Maurice v. Smith, 150 Pa. Superior Ct. 455, 28 A. 2d 811; Commonwealth ex rel. Lieberman v. Burke, 158 Pa. Superior Ct. 207, 208, 44 A. 2d 597; Commonwealth ex rel. Simpson v. Burke, 171 Pa. Superior Ct. 527, 529, 89 A. 2d 898.

force and effect it had in the Pennsylvania courts.[5] **This it did.** The court of appeals, therefore, erred in concluding that the District Court had a duty to inquire into the application on the merits.

[5] Angel v. Bullington, 330 U.S. 183, 187; See also Rooker v. Fidelity Trust Co., 263 U.S. 413; 415; Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405, 412 (Mr. Justice Brandeis, dissenting).

The District Court Did Not Have Jurisdiction

It has long since been settled by this court that the judicial power of the United States does **not** extend to suits against a State by a citizen or resident thereof in the absence of the State's consent.[6] That issue—jurisdiction—may be raised in this court for the first time.[7]

A habeas corpus proceeding is a "suit"[8] involving a "collateral attack on the judgment forming the basis of detention".[9] The criminal judgment was rendered in an action by and in

---

[6] Hans v. Louisiana, 134 U.S. 1; North Carolina v. Temple, 134 U.S. 22; Palmer v. Ohio, 248 U.S. 32; Duhne v. New Jersey, 251 U.S. 311; See also Great Northern Ins. Co. v. Read, 322 U.S. 47, 51; Ford Co. v. Dept. of Treasury, 323 U.S. 459, 464.

[7] Ford Co. v. Dept. of Treasury, 323 U.S. 459, 467. See also M. C. & L. M. Railway Co. v. Swan, 111 U.S. 379, 382; Kentucky v. Powers, 201 U.S. 1, 35; Ex parte McCardle, 73 U.S. (6 Wall.) 318, 327.

[8] Darr v. Burford, 339 U.S. 200, 207; Ex parte Quirin, 317 U.S. 1, 24; Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 564, 567, 597; Bryant v. Zimmerman, 278 U.S. 63, 70; Ex parte Milligan, 71 U.S. (4 Wall.) 2, 112.

[9] Goto v. Lane, 265 U.S. 393, 401.

the name of the State[10] and against the petitioner for the redress of an injury to the public[11], whom the State, in its artificial capacity, represents.[12] The State, and very properly so, has been recognized by this Court as the **real party in interest** in a collateral attack on a State criminal judgment.[13] Indeed, Section 2252 of the Revised Judicial Code[14] clearly recognizes such a proceeding to be a **suit against the State.** More-

---

[10] "* * * All prosecutions shall be carried on *in the name and by the authority of the Commonwealth of Pennsylvania*, and conclude 'against the peace and dignity of the same'." Article 5, Section 23, Constitution of Pennsylvania. (Emphasis supplied)

See also Harger v. Thomas, 44. Pa. 128, 130; Commonwealth v. Neuman, 151 Pa. Superior Ct. 642, 649, 30 A. 2d 698; Commonwealth v. Shimpeno, 160 Pa. Superior Ct. 104, 114; 50 A. 2d 39.

[11] Commonwealth v. Shimpeno, ibid.

[12] 1 Bl. Comm., p. 268; 4 Bl. Comm., p. 2.

[13] Knewel v. Egan, 268 U.S. 442, 448; Cf., Collins v. Miller, 252 U.S. 364, 371; Ornelas v. Ruiz, 161 U.S. 502, 507.

[14] §2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct." 28 U.S.C. 2252.

over, if this Court may, as has been intimated,[15] exercise **original** jurisdiction in this class of case, pursuant to the authority conferred by Section 2241 of the Code,[16] they may **only** do so because the State is a party,[17] since Congress may not constitutionally confer any original jurisdiction upon this Court except in cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be party". (Article III, Section 2, Cl. 2)[18] It is manifest, therefore, that this proceeding is essentially and fundamentally a suit against the State.

Is it material that ministerial officers, who are required by the law of the State to carry into execution the criminal judgment, are the nom-

---

[15] See Darr v. Burford, 339 U.S. 200, 204; Mooney v. Holohan, 294 U.S. 103, 115; Whitten v. Tomlinson, 160 U.S. 231, 239, 240; In re Lincoln, 202 U.S. 178, 180; Cf. Ex parte Mirzan, 119 U.S. 585; Wildenhus's Case, 120 U.S. 1, 11; Ex parte McCardle, 73 U.S. (6 Wall.) 318, 325-326; Matter of Gregory, 219 U.S. 210; Ex parte Terry, 128 U.S. 289, 301; Storti v. Massachusetts, 183 U.S. 138, 143; Ex parte Hudgings, 249 U.S. 378; Ex parte Tracy, 249 U.S. 551.

[16] This Court's power to issue writs of habeas corpus is entirely statutory. Ex parte Bollman, 8 U.S. (4 Cr.) 75, 94.

[17] See, Ex parte Hung Hang, 108 U.S. 552, 553.

[18] Marbury v. Madison, 5 U.S. (1 Cr.) 137; Ex parte Yerger, 75 U.S. (8 Wall.) 85, 98.

inal defendants? The answer to this question is clearly NO.[19] If the relief requested is compulsion against the sovereign, although nominally directed to the officer, the suit is barred "because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction".[20] The relief sought by the petitioner is undeniably compulsion against the State since the State, representing the public,[21] is **not** the nominal defendant [respondent] but the **real party in interest,** and, by necessity, the party against whom the requested relief would essentially operate.[22] Moreover,

---

[19] Larson v. Domestic & Foreign Corp., 337 U.S. 682, 687-688.

[20] Id., at p. 688.

[21] See cases cited footnote 13, supra.

[22] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110; Louisiana v. Jumel, 107 U.S. 711; Hagood v. Southern, 117 U.S. 52; In re Ayers, 123 U.S. 443; Christian v. Atlantic & N. C. Railroad, 133 U.S. 233; Hans v. Louisiana, 134 U.S. 1; North Carolina v. Temple, 134 U.S. 22; Belknap v. Schild, 161 U.S. 10; Harkrader v. Wadley, 172 U.S. 148; Fitts v. McGhee, 172 U.S. 516; Minnesota v. Hitchcock, 185 U.S. 373, 387-388; Chandler v. Dix, 194 U.S. 590; Oregon v. Hitchcock, 202 U.S. 60; Louisiana v. Garfield, 211 U.S. 70; Murray v. Wilson Distilling Co., 213 U.S. 151; Goldberg v. Daniels, 231 U.S. 218; Wells v. Roper, 246 U.S. 335; Ex parte State of New York (No. 1), 256 U.S. 490; Morrison v. New Work, 266 U.S. 481; Highway Comm. v. Utah Co., 278 U.S. 194; Missouri v. Fiske, 290 U.S. 18; Larson v. Domestic & Foreign Corp., 337 U.S. 682.

and this is one of the tests,[23] the respondents would incur **no** personal liability by relying on the unreversed criminal judgment[24]—a rule of practical necessity, for, otherwise, the enforcement of criminal judgments would be fraught with insurmountable difficulties—and, hence, this case does not fall within the class of decisions where that factor was the ratio decidendi[25]. Nor can it be properly catalogued in that class of cases where the fundamental ratio decidendi was that the denial of relief in the Federal courts would very likely, as a practical matter, result in **no** relief, since the States could close the doors to State judicial relief,[26] for the States **must** provide corrective

---

[23] Tennessee Power Co. v. T. V. A., 306 U.S. 118, 137-138; Chandler v. Dix, 194 U.S. 590; In re Ayers, 123 U.S. 443, 500-501; Poindexter v. Greenhow, 114 U.S. 270, 288; U. S. v. Lee, 106 U.S. 196, 219.

[24] Thompson v. Lyle, 3 W. & S. (Pa.) 166; Cf., Erskine v. Hohnbach, 81 U.S. (14 Wall.) 613; Haffin v. Mason, 82 U.S. (15 Wall.) 671, 675; Taylor v. McGrath, D. C. Cir., 194 F. 2d 883; Laughlin v. Rosenman, D. C. Cir., 163 F. 2d 838.

[25] See cases collected in Class II of Mr. Justice Frankfurter's dissenting opinion in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 731-732.

[26] General Oil Co. v. Crain, 809 U.S. 211, 226-227; Poindexter v. Greenhow, 114 U.S. 270; Chaffin v. Taylor, 114 U.S. 309; Herndon v. Chicago R. I. & Pac. R. Co., 218 U.S. 135; Hanley v. Schwalby, 147 U.S. 508, 518.

process for relief from constitutionally invalid criminal judgments.[27] If they do not, relief may be secured in the Federal courts,[28] and properly so, for by **failing to provide corrective process,** the State may and should be regarded as having waived its immunity to suit.[29]

The Constitution of Pennsylvania prohibits the suspension of the writ of habeas corpus "unless when in case of rebellion or invasion the public safety may require it".[30] The right to the writ may not be so hampered by the legislature as to amount to a deprivation of it.[31] Habeas corpus, in Pennsylvania, is undeniably an adequate remedy to collaterally challenge the constitution-

---

[27] Mooney v. Holohan, 294 U.S. 103; Moore v. Dempsey, 261 U.S. 86; Foster v. Illinois, 332 U.S. 134, 139; Hedgebeth v. North Carolina, 334 U.S. 806, 807; Jennings v. Illinois, 342 U.S. 104, 111.

[28] Jennings v. Illinois, ibid.

[29] Cf., Jennings v. Illinois, 342 U.S. 104, supra.

[30] Article I, Section 14, Constitution of Pennsylvania. Identical provisions were contained in Article 9, Section 14 of the Constitutions of 1790 and 1838. Indeed, the judges of the Supreme Court of Pennsylvania and the Courts of Common Pleas were authorized to issue writs of habeas corpus in 1785 (See Act of February 18, 1785, 2 Sm. L. 275, 12 Purdon's Penna. Statutes Annotated, 1871 et seq. which has been continuously effective since that date).

[31] Commonwealth ex rel. Greevy v. Reifsteck, 271 Pa. 441, 445, 115 Atl. 130.

al validity of a criminal judgment.[32] The Supreme Court of Pennsylvania is specifically authorized by the organic law[33] to issue writs of habeas corpus. Since that Court has all the powers of the Court of Kings Bench,[34] it would, apart from specific constitutional authorization, have that power anyhow. Therefore, since the present provision of the organic law remains operative, the writ of habeas corpus will be available in Pennsylvania, subject to the general exceptions that it may not be used as a substitute for an appeal[35] or be abused[36] to test the validity of the basis of detention. If Pennsylvania courts refused relief improperly, this Court may then exercise the appellate jurisdiction conferred

---

[32] Commonwealth ex rel. Smith v. Ashe, 364 Pa. 93, 71 A. 2d 167, c. d. 340 U.S. 812; Commonwealth ex rel. Sheeler v. Burke, 367 Pa. 152, 79 A. 2d 654; Commonwealth ex rel. Darcy v. Claudy, 367 Pa. 130, 79 A. 2d 585, c. d. 342 U.S. 837; Commonwealth ex rel. Daverse v. Hohn, Pa. , A. 2d , c. d. 342 U.S. 812 (not reported); Commonwealth ex rel. Thompson v. Dye, Pa. , A. 2d , c. d. 342 U.S. 929 (not reported).

[33] Article 5, Section 3, Constitution of Pennsylvania.

[34] Commonwealth v. Ragone, 317 Pa. 113, 127, 176 Atl. 454.

[35] Commonwealth ex rel. Greevy v. Reifsteck, 271 Pa. 441, 444, 115 A. 130; Commonwealth ex rel. Sullivan v. Ashe, 325 Pa. 305, 310, 188 Atl. 841; Commonwealth ex rel. Penland v. Ashe, 341 Pa. 337, 340, 19 A. 2d 464.

[36] See cases cited footnote 4, supra.

by Congress and reverse.[37] Surely, in these processes there is adequate protection to the individual from a constitutional invalid criminal judgment. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harvard Law Review, 49, 91-92.

Was Pennsylvania's ratification of the Fourteenth Amendment[38] a consent to suit? This Court has held that the requisite consent **cannot** be derived from the **Constitution or laws** of the United States.[39] Moreover, Article XIV, Section 5 authorizes Congress to enact **only** such corrective legislation "as may be necessary **and** proper for counteracting . . . such acts and proceed-

---

[37] Palmer v. Ashe, 342 U.S. 134.

[38] "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Article XIV, Section 5, Constitution of the United States.

[39] "The right of individuals to sue a State, in either a federal or a state court, *cannot be derived from the Constitution or laws of the United States.* It can come *only from the consent of the State.*" Palmer v. Ohio, 248 U.S. 32, 34. (Emphasis supplied)

Duhne v. New Jersey, 251 U.S. 311, held that Article III, Section 2, Cl. 2, conferring original jurisdiction upon this Court in all cases "in which a State shall be Party" did not operate as consent to suit.

Williams v. United States, 289 U.S. 553, 573 held that Art. III, Section 2, Cl. 1 extending the judicial power of the United States "to Controversies to which the United States shall be a Party", did not operate as consent to suit.

ings as the States may commit or take, and which by the amendment, they are prohibited from committing or taking'"[40] While Congress, undoubtedly, is the judge of what is "necessary", **propriety** is a judicial matter.[41] In making that evaluation not only should other provisions of the Constitution be considered,[42] but also the consequences upon the administration of criminal justice in the States.[43] If these pre-

---

[40] Civil Rights Cases, 109 U.S. 3, 13-14; See also, Collins v. Hardyman, 341 U.S. 651, 659; U. S. v. Reese, 92 U.S. 214; U. S. v. Cruikshank, 92 U.S. 542.

[41] Ibid.

[42] Ibid.

[43] "*Resolution on Habeas Corpus Adopted by the Conference of Chief Justices at Its Fourth Annual Meeting, September* 11-14, 1952.

"Whereas it appears that by reason of certain principles enunciated in certain recent federal decisions, a person whose conviction in a criminal proceeding in a State Court has thereafter been affirmed by the highest court of that State, and whose petition for a review of the State Court's proceedings has been denied by the Supreme Court of the United States, may nevertheless obtain from a Federal district judge or Court, under a writ of habeas corpus, new, independent, and successive hearings based upon a petition supported only by the oath of the petitioner and containing only such statement of facts as were, or could have been, presented in the original proceedings in the State Courts:

"And whereas the multiplicity of these procedures available in the inferior Federal Courts to such convicted persons, and the consequent inordinate delays in the enforce-

cepts are adopted, it is fairly obvious that Congress has exceeded the constitutional grant of power for (1) the jurisdiction conferred is in excess of the judicial power of the United States and (2) it is resulting in unseemly conflicts[44] between the State and Federal courts as well as

---

ment of criminal justice as the result of said Federal decisions will tend toward the dilution of the judicial sense of responsibility, may create grave and undesirable conflicts between Federal and State laws respecting fair trial and due process, and must inevitably lead to the impairment of the public confidence in our judicial institutions;

"Now therefore be it resolved that it is the considered view of the Chief Justices of the States of the Union, in conference duly assembled, that orderly Federal procedure under our dual system of government should require that a final judgment of a State's highest court be subject to review or reversal only by the Supreme Court of the United States;

"Be it further resolved that the Chairman of the Conference of Chief Justices be authorized, and he is hereby directed, to appoint a special committee to give study to the grave questions and potential complications likely to ensue if the power to review or void state court judgments continues to be recognized as lying in any courts of the Federal judicial system, save and except the Supreme Court of the United States; and that said special committee report its findings and recommendations at the next regular meeting of the Conference."

[44] Ibid.; Cf., Almeida v. Baldi, 104 F. Supp. 321, aff'd 195 F. 2d 815, Petition for Certiorari pending at No. 264 October Term, 1952.

inordinate delay in prompt punishment[45] which delay is undesirable[46] and subjects State judges,[47]

---

[45] The procedure of this very case seems to have become standard practice in capital cases in Pennsylvania. See Darcy v. Handy, 97 F. Supp. 930 (pending on appeal) (ineffective assistance of counsel); Daverse v. Hohn, 101 F. Supp. 17, aff'd September 17, 1952, No. 10656, 3 Cir. F. 2d (prejudiced juror); Thompson v. Dye, 103 F. Supp. 776 (pending on appeal) (ineffective assistance of counsel); Almeida v. Baldi, 104 F. Supp. 321, aff'd 195 F. Supp. 815, Petition for Certiorari at No. 264 October Term, 1952 pending (suppression of evidence which the State courts held was immaterial). The crime for which the petitioner was convicted was committed nearly five years ago. The orderly course of justice was interrupted by the federal courts three years ago.

[46] "The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are 'true to the best of his knowledge and belief,' thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe. Wrongly to decide the present cause probably will produce very unfortunate consequences." Moore v. Dempsey, 261 U.S. 86, 93 (Mr. Justice McReynolds, dissenting).

[47] "A complete and exhaustive hearing was held. The petitioner was granted *unlimited* opportunity to present allegations and cross examine witnesses, including *two of the sentencing judges of Crawford County.*" Brink v. Claudy (D. C. W. D. Pa.), 96 F. Supp. 220, 221, 102 F.

juries[48] and defense counsel[49] to excoriating and often embarrassing cross examination by a convict. The respondents realize that this Court, in **Ex Parte Royall,**[50] the genesis[51] of several subsequent pronouncements and holdings,[52] held that Congress had the power to confer jurisdiction upon the United States courts to inquire into the constitutional validity of State processes pursuant to which a person was being detained.[53] That conclusion was based on three

---

Supp. 802-803 (Emphasis supplied); See record in Smith v. Baldi (D. C. E. D. Pa., No. M 1334) 87 F. Supp. 339, which should be part of the record before this Court in this case.

[48] Daverse v. Hohn, 101 F. Supp. 17, aff'd, 3 Cir., No. 10,656, September 17, 1952 F. 2d

[49] Thompson v. Dye, 103 F. Supp. 776, pending on appeal.

[50] 117 U.S. 241, 248-249.

[51] The progenitor of this decision was the decision of Mr. Justice Bradley sitting as a Circuit Justice in Ex parte Bridges, Federal Cases, No. 1,862, which, paradoxically, anticipated the present dilemma.

[52] United States v. Hayman, 342 U.S. 205, 211-212; Frank v. Mangum, 237 U.S. 309, 331; Moore v. Dempsey, 261 U.S. 86.

[53] "* * * If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State, acting through its judiciary or by its officers, the court could not, against the positive language of Congress, declare any such exception, unless required to do so by the terms of the Constitution itself. But as the judicial

premises, viz., (a) the judicial power of the United States extends to all cases arising under the Constitution, the laws and treaties of the United States, (b) the prohibition against the suspension of the writ of habeas corpus (Article I, Section 9, Cl. 2), (c) Congressional power to pass all laws necessary and proper to carry into execution the powers vested in the government of the United States. The first premise (a) was modified three years later[54] by excluding from the judicial power of the United States suits against States by citizens or residents thereof. The second premise (b) not only failed

---

power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. * * *" Ex parte Royall, 117 U.S. 241, 249.

[54] Hans v. Louisiana, 134 U.S. 1; North Carolina v. Temple, 134 U.S. 22.

to observe that the prohibition against the suspension of the writ of habeas corpus was a restriction upon the national Legislature[55] but also that the term "habeas corpus", as used in Article I, Section 9, Cl. 2, was well understood[56] and did not comprehend its availability—at least so far as the States were concerned[57]—to inquire into the validity of a criminal judgment de hors the record.[58] It is submitted that **Ex Parte Royall** the progenitor of the present confusion should be overruled—now.[59]

Did the appearance of the Attorney General of Pennsylvania and the District Attorney of Philadelphia County operate as a waiver of immunity to suit? The answer to this question de-

---

[55] Ex parte Merryman, Federal Cases, No. 9,487 (Taney, C.J.).

[56] Ex parte Watkins, 28 U.S. (3 Pet.) 193, 201.

[57] Section 14 of the Judiciary Act of 1789 which is evidentiary of the connotation of the term "habeas corpus" as employed in Article I, Section 9, Cl. 2 (Ex parte Bollman, 8 U.S. (4 Cr.) 75, 95) and which is "of great value in expounding the meaning of the judicial article of" the Constitution (Williams v. United States, 289 U.S. 576, 573-574) expressly prohibited the issuance of a writ on the application of a person in custody pursuant to State process. Ex parte Dorr, 44 U.S. (3 How.) 103.

[58] Ex parte Watkins, 28 U.S. (3 Pet.) 193.

[59] See Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 405-412 (Mr. Justice Brandeis, dissenting).

pends upon whether or not the State has consented to suit.[60] Article 1, Section 11 of the Constitution of Pennsylvania provides: "Suits may be brought against the Commonwealth in such manner, **in such courts** and in such cases **as the Legislature may by law direct**[61] (emphasis supplied). The Attorney General of Pennsylvania is the head of the Department of Justice.[62] He is the legal advisor of the Governor, in the performance of his official duties, and the chief law officer of the Commonwealth and is authorized to exercise such powers and perform such duties as may now or hereafter be vested in or imposed upon him by the Constitution and laws of this

---

[60] Ford Co. v. Dept. of Treasury, 323 U.S. 459, 466.

[61] "Subject to the limitations arising from the federal nature of our government and the provisions of the federal Constitution the Commonwealth of Pennsylvania is a sovereign State, and, as such, it cannot be sued except with its own consent * * * That consent is conditionally provided by Article I, Section 11 of the State Constitution, which says that 'Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.' * * *" Kaufman Const. Co. v. Holcomb et al., 357 Pa. 514, 516, 55 A. 2d 534. See also, Collins v. Commonwealth, 262 Pa. 572, 575, 106 Atl. 229; Merchants' Warehouse Co. v. Gelder, 349 Pa. 1, 7, 36 A. 2d 444; Bell Telephone Co. v. Lewis et al., 313 Pa. 374, 375, 169 Atl. 571.

[62] Section 206(a), Act of April 9, 1929, P. L. 177, as amended, 71 Purdon's Penna. Statutes Annotated 66(a).

Commonwealth".[63] In addition, the Attorney General of Pennsylvania "is clothed with the powers and attributes which envelop Attorneys General at common law."[64] The Department of Justice has the power and duty "To represent the Commonwealth . . . in any litigation to which the Commonwealth . . . may be a party, or in which the Commonwealth . . . is permitted or required by law to intervene or interplead".[65] This of course, must be construed consonantly with the Constitution (Article 1, Section 11) as authorizing the Attorney General to represent the Commonwealth **only** in such courts and in such cases as the Legislature may by **law** direct". No general law authorizes the Attorney General to appear in behalf of the Commonwealth in the courts of the United States. The State, therefore, has not consented to the suit.[66] Nor do the common law powers of the Attorney General of Pennsylvania alter or modify that conclusion for the reasons that the Attorney General, at common law, did not have the power to waive the

---

[63] Section 704, Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 244.

[64] See Commonwealth ex rel. Minerd v. Margiotti, 325 Pa. 17, 30-31, 188 Atl. 524.

[65] Section 903, Act of April 9, 1929, P. L. 177, 71 Purdon's Penna. Statutes Annotated 293.

[66] Ford Co. v. Dept. of Treasury, 323 U.S. 459, 468-469.

sovereign's immunity to suit.[67] Even if the Attorney General, at common law, had such powers, those powers were modified by Article 1, Section 11 of the Constitution of Pennsylvania. It is clear that the District Attorney's appearance could not possibly work a different result.

---

[67] This could only be done by the Crown's endorsement of a Petition of Right. United States v. Lee, 106 U.S. 196, 238; See also, 1 Daniell's Chancery Pleading & Practice (5th Ed.) p. 125; Attorney General for Ontario v. Russel, 49 Ontario L. Rep. 103, 111; Cf., Hodge et al. v. The Attorney General, 3 Y. & C. Ex. 734; Dyson v. The Attorney General (Ct. of Appeals), 27 T.L.R. 143, 144-145.

Conclusion

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

FRANK P. LAWLEY, JR.,
Assistant Deputy Attorney General,

RANDOLPH C. RYDER,
Deputy Attorney General,

ROBERT E. WOODSIDE,
Attorney General.